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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 78-184

CHRIST T. SERAPHIM,
PETITIONER,

v.

THE STATE OF WISCONSIN; THE SUPREME COURT OF THE STATE OF WISCONSIN; THE HONORABLE BRUCE F. BEILFUSS, CHIEF JUSTICE OF THE SUPREME COURT; THE STATE OF WISCONSIN JUDICIAL COMMISSION, KAY LEVIN, CHAIRPERSON,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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STATEMENT OF THE CASE

The facts are correctly stated in the opinion of the Supreme Court of the State of Wisconsin which is reproduced in the appendix filed by petitioner and is reported *In Matter of Complaint Against Seraphim,* 97 Wis. 2d 485, 294 N.W.2d 485 (1980).

We respectfully direct the Court's attention to the opinion because it presents a complete discussion of all of the facts rather than relying upon the statement of the case as set forth in the petition which, at best, is incomplete.

REASONS FOR NOT GRANTING WRIT OF CERTIORARI

I. No Important Questions Relating To Due Process And Specifically To Retrospective Application Have Been Presented Which Have Not Been Settled By This Court.

Petitioner apparently contends that he was denied notice in connection with allegations of misconduct occurring prior to August 1, 1978, the effective date of the constitutional amendment providing for suspension and removal of judges, and that therefore, he was denied due process. He relies on *In Re Inquiry Concerning A Judge,* 357 So. 2d 172 (Fla. 1978). In that case, all of the conduct for which the judge was to be disciplined took place prior to the effective date of the constitutional amendment which was being applied. The court ruled that the Florida amendment had only prospective application. However, there is no indication that the United States Constitution was the basis for the court's decision. The decision is based on lack of notice under the Florida constitution.

Here, the Code of Judicial Ethics which petitioner was found to have violated was adopted by the Wisconsin Supreme Court on January 1, 1968. Therefore, petitioner had written notice from that time as to the conduct expected of him as a member of the judiciary. In 1971, the court adopted rules for implementing the Code of Judicial Ethics but noted that

sanctions of removal or suspension would require constitutional authorization. Yet, the petitioner was on notice that the Supreme Court of Wisconsin viewed violations of the Code of Ethics seriously.

Petitioner's argument that the consideration of conduct prior to the effective date of the constitutional change violates his due process rights is similar to the contentions rejected by this Court in *Dobbert v. Florida,* 432 U.S. 282 (1977). There, the Supreme Court of Florida had declared the death penalty statute of that state to be unconstitutional, and the petitioner contended that because there was no death penalty "in effect" in Florida at the time of the murder he could not be sentenced to death under a statute subsequently enacted. This Court rejected that contention saying: "Here the existence of the statute served as an 'operative fact' to warn the petitioner of the penalty which Florida would seek to impose on him if he were convicted of first-degree murder." *Dobbert,* 432 U.S. at 298.

However, the issue as to whether prior conduct can be considered is actually moot because the Supreme Court of Wisconsin found at *Seraphim,* 97 Wis. 2d 501-03, 294 N.W.2d 494-95, that the conduct which occurred after the effective date of the constitutional amendment was a substantial portion of the conduct found to be supported by the evidence. The court found that the judge continued to engage in the same types of conduct after the amendment as he had engaged in before and that his conduct cannot be explained by a lack of notice. *Seraphim,* 97 Wis. 2d 495, 294 N.W.2d 492. Where the same result would obtain without the alleged constitutional violation, a due process claim is not stated. *Mt. Healthy City School Dist. v. Doyle,* 429 U.S. 274 (1977).

II. Rules 8, 11, 15, 16 And 17 (e) Of The Wisconsin Code Of Judicial Ethics And Sec. 757.81 (4) (a), Wis. Stats., Are Not Impermissibly Vague.

Petitioner apparently contends that the use of the term "misconduct" in the Wisconsin Statutes denies him due process because of vagueness. The term is defined, in part, as including: "Wilful violation of a rule of the code of judicial violation of a rule of the code of judicial ethics." Sec. 757.81 (4) (a), Wis. Stats. Rules 8, 15, 16 and 17 (e) which petitioner has been found guilty of violating deal with respectively:

(1) The acceptance of gifts,

(2) Comments upon the merits of a pending judicial proceedings,

(3) Aggravated and persistent failure to comply with the standards of the code,

(4) Failure to report the value of gifts in excess of One Hundred Dollars ($100.00).

Whatever the claim is in regard to vagueness in respect to these four rules, the evidence adduced at the hearing which consume eight (8) days and covers 1,800 pages so clearly brings the petitioner within the terms of those rules that any vagueness has not affected the petitioner in this case. Evidence regarding Rule 8 can be found at *Seraphim,* 97 Wis. 2d 500-01, 294 N.W.2d 494; in regard to Rule 15 at *Seraphim,* 97 Wis. 2d 503-09, 294 N.W.2d 495-98; the persistent nature of the violations within the meaning of Rule 16 is evident from the dates of the conduct which run from 1969 to 1979; and in regard to Rule 17 (e), from the evidence relating to the automobile leases at Sixty Dollars ($60.00) per month from 1975 to 1978 and Seventy-Five Dollars ($75.00) per month for 1979 when others were paying One Hundred Eighty-Five Dollars ($185.00) in

1975 to Two Hundred Fifty Dollars ($250.00) in 1979 for the same services.

Where the challenge of vagueness is based upon inadequate notice, therefore, it must fail where the rules are unquestionably applicable to petitioner. *Parker v. Levy,* 417 U.S. 733 (1974) and *Young v. American Mini Theatres, Inc.,* 427 U.S. 50 (1976). In *Young,* this Court said at 427 U.S. 58-59:

> For even if there may be some uncertainty about the effect of the ordinances on other litigants, they are unquestionably applicable to these respondents. ... It is clear, therefore, that any element of vagueness in these ordinances has not affected these respondents. To the extent that their challenge is predicated on inadequate notice resulting in a denial of procedural due process under the Fourteenth Amendment, it must be rejected.

The fifth category of conduct which was held to violate Rule 11, which provides: "A judge shall not indulge in gross, personal misconduct," consisted of five separate incidents involving the petitioner's conduct with women. This conduct which involved verbal and physical sexual communications with women who were strangers or casual acquaintances apparently constitutes the conduct alleged by the petitioner to be protected by the first amendment. He cites *N.A.A.C.P. v. Button,* 371 U.S. 415, 433 (1963), for the proposition that these "First Amendment freedoms need breathing space to survive." It is contended that the standard of permissible statutory vagueness is strict in the area of freedom of expression and that the term "misconduct" fails to provide adequate notice, and therefore, violates due process.

The standards which generally define judicial misconduct and which most frequently are invoked by

disciplinary agencies are not always very specific. However, most courts have almost uniformly held that regulations which prohibit "conduct that is prejudicial to the administration of justice," *Nicholson v. Jud. Ret. and Removal Com'n,* 562 S.W.2d 306 (Ky. 1978), or "for cause," *Napolitano v. Ward,* 457 F.2d 279 (7th Cir.), *cert. denied,* 409 U.S. 1037 (1972), *rehearing denied,* 410 U.S. 947 (1973), are not void for vagueness nor over broad.

> Furthermore, conduct which does not constitute a criminal offense may be sufficiently violative of the Judicial Canons to warrant removal for cause. The District Court so found herein. See Friedman v. Court on the Judiciary of New York, 375 U.S. 10, 80 S.Ct. 70, 11 L.Ed. 2d 40 (1963); Sarisohn v. Appellate Division, Second Department, Supreme Court of the State of New York, 265 F. Supp. 455 (E.D.N.Y.1967); Matter of Osterman, 13 N.Y. 2d a (1963), cert. den. Osterman v. Court on the Judiciary of the State of New York, 376 U.S. 914, 84 S.Ct. 660, 11 L.Ed.2d 611 (1964).
>
> Appellant's contention that he was removed for only his personal behavior is not supported from the record of this case and the pertinent Canons of Judicial Ethics. We feel the framers of the Canons were of the view that separation of the behavior of a judge while off the bench from his conduct in the courtroom is impossible.

Napolitano, 457 F.2d at 284.

Judicial disciplinary sanctions involving even so drastic a penalty as removal from office have been characterized as administrative or civil and non-penal in nature.

As with the Uniform Code of Military Justice which was examined in *Parker,* 417 U.S. 733, a greater degree of flexibility and breadth is permitted by the courts with respect to judicial disciplinary rules and statutes. In *Parker,* this Court held that art. 133 of the Uniform Code of Military Justice which punishes an officer for "conduct unbecoming an officer and a gentleman," and art. 134 of the Code which punishes "all disorders and neglects to the prejudice of good order and discipline in the armed forces" were not unconsitutionally vague.

Here, in Rule 11, the term "misconduct" is defined as engaging in "gross personal misconduct." The Wisconsin Supreme Court accepted the hearing panel's conclusion that the petitioner's conduct with the five women consisted of "unprivileged and non-consensual physical contacts with offensive sexual overtones, the totality of which is gross personal misconduct" which violated Rule 11.

The evidence justifies the finding of gross personal misconduct. But even if such a standard violated the constitutional rights of the petitioner, the violations of Rules 8, 15, 16 and 17 (e) would clearly support the actions of the panel and the Wisconsin Supreme Court, and the constitutional violation would be harmless within the meaning of *Mt. Healthy City School Dist.,* 429 U.S. 274.

III. Denying Jury To Petitioner Does Not Violate Equal Protection Clause.

Petitioner contends, without citing authority, that sec. 757.87 of the Wisconsin Statutes allowing the Judicial Commission to request a lay jury and denying the petitioner the same right violates the equal protection clause of the fourteenth amendment. The

equal protection clause requires equal protection and security for all under like circumstances in enjoyment of their personal and civil rights.

Section 757.87 (1), Wis. Stats., provides that the Judicial Commission, after finding probable cause that a judge has engaged in misconduct, may request a jury hearing. There is no provision for a judge to request a jury hearing. No judge, appellate or trial, is entitled under the law to a hearing before a lay jury. The choice between a judicial panel and a lay jury lies entirely with the Commission. Petitioner contends that to allow the accuser to select the forum in which the accused is to be tried is contrary to the concept of fair play implicit in the equal protection clause.

The Wisconsin Supreme Court rejected those contentions pointing out that: "Under the judicial disciplinary procedure established by the legislature, respondent is afforded no less protection than any other judicial officer of this state who is alleged to have engaged in judicial misconduct." *Seraphim,* 97 Wis. 2d 496, 294 N.W.2d 492.

Equal protection of the laws is not denied to any person by a statute which is applicable to all persons under all circumstances and does not subject the individual to an arbitrary exercise of power. *Lowe v. Kansas,* 163 U.S. 81 (1896).

IV. Petition Fails To Comply With Rule 19.

The petitioner has failed to show that there are special and important reasons for granting a writ of certiorari in this case. Not only does the petition fail to set out where the state court has decided a federal question of substance not theretofore determined by this court, but the petition also fails to show that any

of the decisions of the Wisconsin Supreme Court in this case are not in accord with applicable decisions of this Court. There have been no improper, retrospective application of laws against the petitioner, the rules of conduct and the Wisconsin Statutes are not impermissibly vague and the petitioner has no constitutional right to a jury trial on charges of misconduct which involve no criminal penalty.

CONCLUSION

Because the petitioner has failed to establish justification for the issuance of a writ of certiorari, the petition should be denied.

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